No. 73-1898

JUN 19 1974

MICHAEL RODAK, JR.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

MICHIGAN NATIONAL BANK,
a National Banking Association,
Petitioner,

vs.

SARAH GRIGG, for herself, and the METROPOLITAN DETROIT AFL-CIO COUNCIL, an unincorporated voluntary association, on behalf of all other customers of Michigan National Bank, who have incurred interest charges pursuant to their use of Michigan Bankard and Michigan BankAmericard credit cards,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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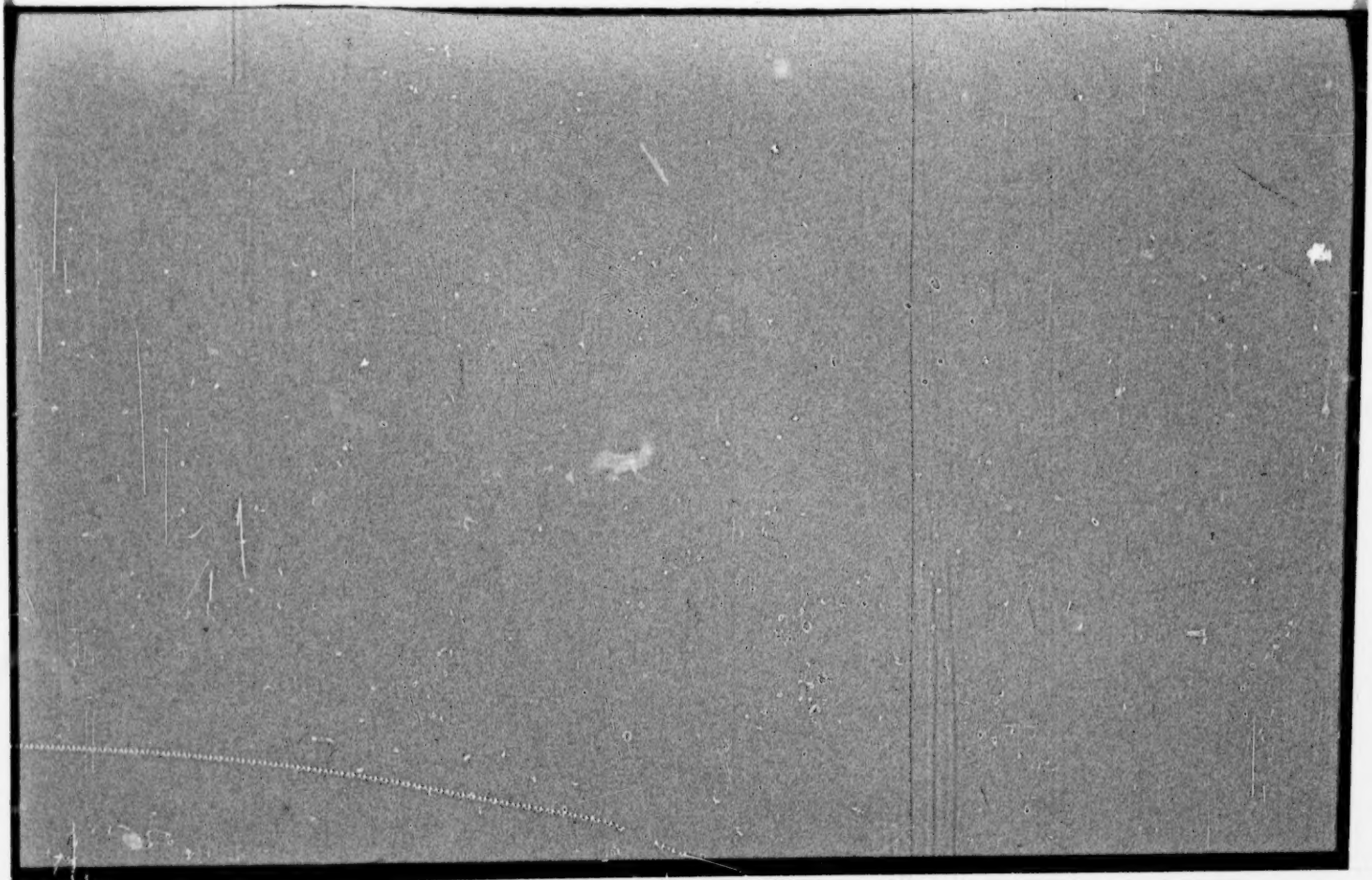

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

The Petitioner Michigan National Bank respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeals of the State of Michigan entered in this proceeding on June 22, 1973.

OPINIONS BELOW

The Opinion of the Court of Appeals of Michigan, the Order of the Supreme Court of Michigan denying leave to appeal, the Order of the Supreme Court of Michigan denying reconsideration and the Opinion of the Circuit Court for the County of Ingham, State of Michigan, all of which are unreported, appear in the Appendixes hereto.

JURISDICTION

The Judgment of the Court of Appeals of Michigan (Appendix A) was entered on June 22, 1973. The Order of the Supreme Court of Michigan denying application for leave to appeal (Appendix B) was entered on November 29, 1973. The Order of the Supreme Court of Michigan denying reconsideration of its Order denying leave to appeal (Appendix C) was entered on March 27, 1974 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC Section 1257(3).

QUESTION PRESENTED

Whether 12 USCA 86, which permits an individual penalty recovery against a national bank of twice any usurious interest paid, does by its very terms preclude class actions to recover the penalty.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 12:

Section 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding sec-

tion, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: PROVIDED, that such action is commenced within two years from the time the usurious transaction occurred."

STATEMENT OF THE CASE

In its present posture, this case represents one of those monolithic class actions which, in this latter day, are inundating Federal and State Courts, particularly the former. In this case, Plaintiff-Respondent, claiming to be a representative Plaintiff for the class, purports to sue to recover the penalties provided by 12 USCA 86 on behalf of a class consisting of all holders of Michigan Bankard and Michigan BankAmericard credit cards during a period antedating the filing of the Complaint by two years. Although a precise court of the members of the putative class has not as yet been undertaken, Petitioner is in agreement with the representation of Plaintiffs' counsel to the Court of Appeals during oral argument that upwards of 400,000 customers would comprise the sought-for-class. A penalty of twice the interest paid during the relevant two-year period could amount to about $33,000,000.00.

Plaintiff's Complaint, filed on June 3, 1971, alleged that Defendant had violated and was continuing to violate Michigan law, particularly Section 191 of the Michigan Banking Code of 1969, Michigan Compiled Law Annotated Section 487.491, with respect to the computation of interest charges on purchase made with its credit cards, and that as a consequence thereof, had violated and was continuing to violate the National Bank Act, particularly 12 USC 85 and 86, which fixes the amount of interest permis-

sible to national banks and provides the penalty for violation thereof.

On November 1, 1972 the trial court granted Defendant-Petitioner's Motion for Summary Judgment. The trial court's Opinion as supplemented by an Addendum dated November 6, 1972 granted Defendant-Petitioner Summary Judgment on the ground that a person seeking the penalty for usury provided by 12 USCA 86 must file the action in his own behalf and may not sue on behalf of others to recover such penalties. Therefore, ruled the trial court, a class action may not be maintained to recover the penalty under 12 USCA 86.

The trial court's Opinion also partially granted Plaintiffs-Respondents' Motion for Summary Judgment by enjoining Defendant from charging excessive interest "if in fact it is", but did not determine that Defendant had ever charged excessive or usurious interest.

Plaintiffs appealed to the Michigan Court of Appeals and on June 22, 1973 the Court of Appeals reversed the trial court and remanded the case "for further proceedings relating to the establishment by Plaintiffs of all the other requirements of a class action under our statutes and rules of court."

Defendant-Petitioner sought leave to appeal to the Michigan Supreme Court, but was denied by the Court's Order dated November 29, 1973. Defendant's timely request for reconsideration by the Michigan Supreme Court was denied on March 27, 1974.

Defendant-Petitioner seeks a Writ of Certiorari to review the decision of the Michigan Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Michigan Court of Appeals Conflicts with the Literal Language of the Statute and Past Court Interpretations of the Statute.

The merits of this appeal involve but a single issue and that issue is entirely governed by the provisions of 12

USCA 86 and the authorities construing it. 12 USCA 86 provides in pertinent part:

> "In case the greater rate of interest has been paid, *the person by whom it was paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same . . .*" (emphasis added).

It is the position of Petitioner that, contrary to the holding of the Michigan Court of Appeals, 12 USCA 86 both on its face and as construed by pertinent authority prohibits the maintenance of a class action to recover the penalties which it provides. Petitioner contends that the penalty recovery afforded by this statute is personal to the person paying the usurious interest or to his legal representatives; that the right of action is non-assignable and inalienable; that no action therefore may be maintained except by him who pays the usurious interest or his legal representative; and that the inherently gratuitous representation of others who may be entitled in their own right to such penalties by a class representative is inimical to the policy and intent of the statute. Necessarily, of course, the issue is purely a question of Federal Law.

At the outset, it can be noticed in passing that a class representative is not "the legal representative" of the person paying the allegedly usurious interest, for the authorities are uniformly to the effect that only such persons as accede to the right of recovery by operation of law are to be deemed a legal representative of the person paying the usurious interest. Illustrative of this proposition are *Pardoes* v *Iowa State National Bank*, 106 Iowa 345, 76 NW 800 (1898) and *Louisville Trust Company* v *Kentucky National Bank*, 102 F 442 (1900). Also beyond argument is the concept that the recovery permitted by 12 USCA 86 is a penalty, such having been the uniform holdings of the United States Supreme Court itself, *Farmers National Bank* v *Dearing*, 91 US 29, 23 L Ed 196 (1875) and *Tiffany* v *National Bank of Missouri*, 18 Wall (85 US) 409, 21 L Ed 862 (1873). In line with general principles applicable to the recovery of penalties, it is the con-

tention of Defendant-Petitioner that the penalty of 12 USCA 86 is limited to those persons specified by the statute who are authorized by it to maintain the action. Such is supported by authority both general and specific. See 70 CJS Penalties, Section 5, Page 294 and *Barnett* v *Shelbyville National Bank,* 85 Tenn 426, 3 SW 117 (1887). That the right of recovery under 12 USCA 86 is personal to the person paying the usury and insusceptible to assignment or alienation is established by many authorities of which the following are representative:

Barnett v *Shelbyville National Bank,* supra;

Lealos v *Union National Bank,* 9 ND 60, 81 NW 56, 58 (1899);

Pardoes v *Iowa State National Bank,* supra;

Osborn v *First National Bank of Athens,* 175 PA ST 494, 34 A 858 (1896).

The mandate of the statute that the action to recover its penalties must be maintained by the person paying the usurious interest or his legal representatives as an independent action has been enforced by the United States Supreme Court on the premise that this remedy is exclusive. *Farmers and Mechanics National Bank* v *Dearing,* supra. This is even carried to the point where efforts to assert and recover the penalty by means of counter-claim or set-off have been uniformly denied as the following cases will illustrate:

Barnett v *National Bank,* 98 US 555, 25 L Ed 212;

John R. Alley & Co v *Federal National Bank of Shawnee,* CCA Okla 1942, 124 F2d 995;

First National Bank of Steele (Mo App, 1933) 59 SW 2d 773.

In short, it is clear from the authorities that 12 USCA 86 is no ordinary statute. On the contrary, as the same has been construed by the authorities, it was the intent of Congress to prescribe a precise penalty for usury by national banks, to limit the recovery of such a penalty to only the person paying the interest or to his legal representatives,

to make the right of recovery inalienable and to mandate that it be asserted by the party paying the penalty or his legal representatives in an independent action in the nature of debt. All of these criteria, Defendant-Petitioner submits, cannot be reconciled to a class action proceeding, however salutary one might generally be disposed toward the class action device.

2. The Issue Presented in this Case is One of First Impression and Vitally Affects Every National Bank in the United States.

The issue here presented is truly a novel one. After exhaustive research, counsel for Defendant-Petitioner can state that no case has been discovered in any jurisdiction dealing with the precise issue here involved, namely, whether or not the device of a class action may be used to recover the penalty provided by 12 USCA 86.[1] Counsel for Defendant-Petitioner has been advised by the legal office of the Comptroller of the Currency that its legal staff has never encountered this issue during the history of that office.

The importance of a decision on this issue cannot be overemphasized. There are approximately 4,600[2] national banks in the United States, many of whom issue credit cards and all of whom are subject to 12 USCA 86 and therefore potentially subject to a class action under 12 USCA 86 if class actions are maintainable under the statute.

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[1] It is true that in *Partain, et al* v *First National Bank of Montgomery* (CA 5, 1972) 467 F 2d 167, a class action for the recovery of usury against a national bank has been allowed. However, neither that case nor any other case presented the precise issue to the court as to whether 12 USCA 86 itself foreclosed a class action. The class action issue in the *Partain* case was only whether or not the criteria of the applicable court rule governing class actions had been met.

[2] 1971 Annual Report of the Comptroller of the Currency, p. 152.

The penalty provided by 12 USCA 86 is forfeiture of *twice* of all of the interest collected, not just twice of that part of the interest which is above the permitted rate. The penalty provided by 12 USCA 86 is severe enough by itself, but when that penalty is multiplied by three or four hundred thousand or even a million — and that is the effect of permitting a class action in a credit card case — the result is a financially disastrous retribution never intended by Congress.

3. The Decision of the Michigan Court of Appeals is "Final" Within the Meaning of 12 USC 1257(3).

The decision of the Michigan Court of Appeals did remand this case back to the trial court for further proceedings, but it did decide with *finality* that class actions may be maintained under 12 USCA 86. The issue decided by the Court of Appeals is separate and distinct from the merits of the case. The Court of Appeals decision falls within that group of cases spoken of by this Court in *Cohen* v *Beneficial Loan Corp,* 337 US 541 (1949). In *Cohen,* this Court said:

> "This decision appears to fall in that small class which finally determines claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 US at 546.

In *Eisen* v *Carlisle & Jacquelin,* ..... US ..... (May 28, 1974) this Court held that an Order requiring the defendant to pay 90% of the notice cost in a class action was a final appealable order because it was "a final disposition of a claim of right which is not an ingredient of the cause of action and does not require consideration with it."

In *Construction Laborers* v *Curry*, 371 US 542 (1962) this Court permitted review of a temporary injunction by a state court because,

> "Whether or not the Georgia courts have power to issue an injunction is a matter wholly separate from and independent of the merits of respondents' cause." 371 US at 548.

In *Mercantile National Bank* v *Langdeau*, 371 US 555 (1962), an Order of a state court determining proper venue for a suit against a national bank was held to be final for purposes of review. This Court said:

> "This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 USC Section 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."

Similarly, unless review is granted of the Michigan Court of Appeals decision in this case, the parties may be subjected to long and costly litigation for naught. Litigation of this action, which involves perhaps 400,000 plaintiffs and millions of individual transactions and computations, will be tremendously expensive not only in money but also in the time of the parties and the court. If Defendant-Petitioner is right and this Court ultimately holds that a class action may not be maintained under 12 USCA 86, the time and expense of litigation will be for naught. If that occurs, there will be no way that Defendant-Petitioner can recoup all of its expenses and loss from the representative Plaintiff-Respondent.

More importantly, if review is not granted now, Defendant-Petitioner may be forced to settle this case with-

out ever having determined whether or not the action could even have been properly brought under 12 USCA 86. William Simon, writing in *Class Actions* (PLI, 1973, pp 154-155), recognizes the realities of denying appeal of an Order certifying a class action:

> "In most instances an order certifying a class has been held a nonappealable, interlocutory order. Defendants are effectively precluded, therefore, from obtaining appellate review of such orders because *the overwhelming pressure from the threat of potential liability of millions of dollars invariably results in settlement prior to trial regardless of the merits of plaintiff's claims.*" (emphasis added).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 17, 1974

APPENDIX A — JUDGMENT OF THE MICHIGAN COURT OF APPEALS

(Entered June 22, 1973)

-1-

BEFORE: QUINN, PJ; BRONSON AND O'HARA, JJ.

PER CURIAM

As this Court said in *Paley* v *Coca Cola Co*, 39 Mich App 379, 380 (1972):[1]

"We write to a single, narrow and precise issue."

We do likewise here. The question is whether the pertinent provision of the National Bank Act — 12 USCA 86 — excludes by its own terms a class action against a national bank, as opposed to individual recovery only by one claiming to be wronged under the terms of the act, and eligible for the specific benefit provided for therein.

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[1] Leave to appeal was granted in 387 Mich 797 (1972).

-2-

The federal statute provides:

> "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. *In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same*: Provided, That such action is commenced within two years from

the time the usurious transaction occurred."[2] (Emphasis supplied).

It is the theory of the defendant that because the act in literal terms authorizes specific benefits for the person by whom the prohibited rate of interest has been paid or his legal representative, it is impermissible for one claiming to be representative of a class to maintain a state class action under this state's statutes and court rules.

Contrariwise, plaintiffs assert that they are the proper representatives of a class. This class, plaintiffs argue, could not afford to litigate their individual claims personally and that this situation is the very reason for the recognition and maintenance of class actions under the law.

Both parties have persuasive precedent, state and federal, for their respective positions.

The trial court took the position advocated by defendant. It dismissed the class action. It allowed plaintiff Grigg to proceed with her individual suit. It also author-

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[2] For the statutory provision with respect to permissible interest rates, see 12 USCA 85.

ized an injunction running in favor of the individual plaintiff against defendant bank restraining it from charging the claimed usurious interest. The effect of the holding appears to be that the court decided for plaintiff on the merits by reason of entering a partial summary judgment in her behalf, but held the same relief was not available to the members of the same class. The holding seems to be partially interlocutory in that it awarded no specific money damages to the individual plaintiff, but final in the sense that it dismissed the asserted class action.

The general principle relied on by the trial judge is that in actions to enforce the penal provisions of a statute, the statute must be construed strictly; that where a specific recovery is provided recovery is limited to damage contained in the statute and is limited in its application to per-

son or persons designated in the act. Thus, the trial judge in legal effect held that plaintiff Grigg was not the "legal representative" of anyone within the meaning of the federal statute, that she had an individual cause of action limited to the return of twice the amount of the usurious interest, because strictly construed that's all the federal statute allowed. Plaintiff replies that the rule of strict construction is not one of construction so narrow as to create a judicial exemption for national banks under the Michigan rules and statutes governing class actions and that the

silence of Congress when passing the statute does not justify the conclusion that this particular act excludes a class action.

We have dealt with the question in general principles rather than on a detailed case analysis because the cause will of necessity be returned to the trial court for further proceedings.

We hold that the construction of the statute urged by the defendant and adopted by the trial court is unduly restrictive and that the class action asserted based upon the act is permissible.

We vacate the partial summary judgment entered in favor of plaintiff for the reason that it can be read as an adjudication of the merits of the action asserted by the class upon which we do not pass.

We remand to the trial court for further proceedings relating to the establishment by plaintiffs of all the other requirements of a class action under our statutes and rules of court.

We commend to the trial court for particular attention the case of *Ratner* v *Chemical Bank New York Trust Co*, 54 FRD 412 (SD NY, 1972) to the extent that subsequent proofs may establish its applicability. In our holding we have considered carefully *Partain* v *First National Bank of Montgomery*, 467 F2d 167 (CA 5, 1972) and *Zachary* v *Chase Manhattan Bank*, 52 FRD 532 (SD NY, 1971). Costs to plaintiff.

APPENDIX B — MICHIGAN SUPREME COURT ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(Entered November 29, 1973)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of November in the year of our Lord one thousand nine hundred and seventy-three.

Present the Honorable

Thomas M. Kavanagh,
Chief Justice,
Thomas E. Brennan,
Thomas G. Kavanagh,
John B. Swainson,
G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
Associate Justices

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, because the appellant has failed to persuade the Court that the question presented should be reviewed by this Court.

M. S. Coleman, J., would grant leave.
T. E. Brennan, J., not participating.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 30th day of November in the year of our Lord one thousand nine hundred and seventy-three.

(s) Harold Hoag
Deputy Clerk

APPENDIX C — MICHIGAN SUPREME COURT ORDER DENYING RECONSIDERATION OF ITS ORDER DENYING LEAVE TO APPEAL

(Entered March 27, 1974)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 27th day of March in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable

Thomas M. Kavanagh,
Chief Justice,
Thomas G. Kavanagh,
John B. Swainson,
G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
John W. Fitzgerald,
Associate Justices

On order of the Court, (J. W. Fitzgerald, J., not participating), defendant's motion for reconsideration of the order of this Court entered on November 29, 1973, denying defendant's application for leave to appeal is considered, and the same is DENIED, for the reason that it does not appear that said order was erroneously entered.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 27th day of March in the year of our Lord one thousand nine hundred and seventy-four.

(s) Harold Hoag
Deputy Clerk

APPENDIX D — INGHAM COUNTY CIRCUIT COURT OPINION

OPINION OF THE COURT

This matter is before the court on a motion for summary judgment brought by counsel for the plaintiffs and on a cross-motion for summary judgment brought by counsel for the defendant.

When a person has a claim of usury, only the person claiming the usury or his "legal representative" may bring the action. Sarah Grigg is not the "legal representative" of the class of persons involved as plaintiffs in this suit, and therefore, has no authority to bring an action upon their behalf.

It is the opinion of this court that the case should be dismissed as to all plaintiffs except Sarah Grigg.

The court is also of the opinion that partial summary judgment should be granted to Sarah Grigg in the form of

an injunction preventing the defendant from charging her excessive interest.

Therefore, the motion for summary judgment brought by the plaintiff shall be and the same hereby is partially granted.

The motion for summary judgment brought by the defendant shall be and the same hereby is granted in regard to all plaintiffs except Sarah Grigg.

The case shall be continued in accordance with the court rules.

An order or orders may enter, agreeable to this opinion.

Dated: November 1, 1972.

Sam Street Hughes
Circuit Judge

ADDENDUM TO OPINION
(Filed November 1, 1972)

In order to clarify the opinion, the Court adds the following:

On the present state of the record, the Court cannot determine whether the Plaintiff Grigg was ever charged usurious interest and the Court makes no such determination.

Dated: November 6, 1972

(s) Sam Street Hughes
Circuit Judge

(Filed Nov. 8, 10:49 AM '72, C. Russ Milliard, County Clerk, Ingham County, Mason, Michigan)

(Recorded—Order Book 136, Page 10)